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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

J. BARANELLO & SONS,

Plaintiff-Petitioner,

—against—

CITY OF PATERSON,

Defendant-Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents the question of whether the New Jersey courts erred in holding, contrary to federal circuit court decisions rendered under the Arbitration Act, 9 U.S.C. §§ 1-14 (which this Court has held to create a body of federal substantive law applicable in both federal and state courts), that an industry arbitration panel deciding commercial disputes must disclose the basis of its award in sufficient detail to establish that the panel followed all of the technical rules of contract interpretation and all of the technical rules of evidence that a state court might have applied in hearing the same case, and that the arbitration award must be vacated and the matter remanded "for a new arbitration proceeding" because the panel failed to do so.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner J. Baranello & Sons (a New York partnership) and respondent the City of Paterson, New Jersey, are the only parties to this action. However, in the proceedings below, this action, which involves disputes arising out of a construction contract between Baranello and the City, was consolidated with similar actions commenced against the City by the four other prime contractors involved in the construction project which gave rise to this action; in addition, the arbitration award on which the instant action is based was rendered in a consolidated arbitration proceeding which also involved the four other prime contractors. The other contractors were Consolidated Precast, Inc. (a Connecticut corporation), Independent Electrical Construction Co., Inc. (a New Jersey corporation), Davidson & Howard Plumbing & Heating, Inc. (a New Jersey corporation), and The Conditioning Co., Inc. (a New Jersey corporation).

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GROUNDS OF JURISDICTION

The judgment to be reviewed was issued by the Supreme Court of New Jersey under date of November 21, 1983, and was entered on November 28, 1983.

The statutory provisions which confer jurisdiction upon this Court are 28 U.S.C. § 1257(3) and 9 U.S.C. §§ 1-14.

THE STATUTE AT ISSUE

The pertinent sections of the Arbitration Act, 9 U.S.C. §§ 1-14, are set forth in the appendix submitted herewith (A. 22-25*).

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* References to the Appendix to this Petition are so designated.

STATEMENT OF THE CASE

Procedural History of the Litigation

In April 1977, plaintiff-petitioner J. Baranello & Sons ("Baranello"), a New York partnership, entered into a contract with defendant-respondent City of Paterson, New Jersey, for general construction work on a building to house the City's police and fire departments. The City also entered into separate prime contracts relating to the same project with the four specialty-trade contractors referred to above. The work commenced in May 1977, but construction was delayed due to the discovery of rock at the excavation site, large accumulations of water (later determined to be coming from a water main located on or near the property), and disputes between the contractors and the City. Claims were asserted by the contractors against the City and by the City against the contractors.

Pursuant to the arbitration clauses in each of the prime contracts, arbitration proceedings between the contractors and the City were commenced in 1978 under the Construction Industry Rules of the American Arbitration Association. Baranello initially challenged the scope of the arbitration but was compelled to arbitrate "all claims, disputes and other matters arising out of or related to the contract." *J. Baranello & Sons v. City of Paterson*, 168 N.J.Super. 502, 403 A.2d 919 (App.Div. 1979), *certif. den.*, 81 N.J. 340, 407 A.2d 1214 (1979) (A. 17-21).

Arbitration hearings began in September 1980, and twenty-three arbitration hearings were held over a period of a year. During the middle of one of the hearings, the City made an oral motion, in essence for partial summary judgment, requesting that the arbitrators refuse to consider certain portions of the claims on the ground that such portions had been waived by the contractors; the arbitrators denied the motion without assigning a reason therefor.

On October 21, 1981, the arbitrators issued an award against the City in favor of Baranello and each of the other contractors.

The lump-sum award in favor of Baranello was in the amount of approximately $1.5 million out of the approximately $2.3 million claimed by Baranello over and above its contract retainage. The award was confirmed in favor of each contractor by judgments of the Law Division of the Superior Court of New Jersey dated November 23, 1981.

Upon appeal by the City, the Appellate Division of the Superior Court of New Jersey reversed the judgments confirming the awards, vacated the awards and remanded the matter "for a new arbitration proceeding," based upon the Appellate Division's observation that "we do not know" whether the lump-sum award to each contractor includes damages which a state court would have held were barred by the terms of the contracts. *J. Baranello & Sons v. City of Paterson*, ___ N.J.Super. ___, ___ A.2d ___ (App.Div. 1983), *certif. den.*, ___ N.J. ___, ___ A.2d ___ (1983) (A. 3-13).

By order dated November 21, 1983, and filed November 28, 1983, the Supreme Court of New Jersey denied, without opinion, the petitions for certification of each of the contractors, including Baranello.

The Federal Question Presented

As above stated, the question presented by this case is whether an industry arbitration panel deciding commercial disputes under the Arbitration Act, 9 U.S.C. §§ 1-14, must disclose the basis of its award in sufficient detail to establish that the panel followed all of the technical rules of contract interpretation and all of the technical rules of evidence that a state court would have applied in hearing the same case.

The applicability of the Arbitration Act was not raised as an issue before the Law Division of the Superior Court of New Jersey* or before the Appellate Division of the Superior Court

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*It is noteworthy that, although Baranello could have sought confirmation of the award in federal court on the basis of diversity, it chose the New Jersey state forum because its claims had been consolidated in the arbitration proceedings with those of the other contractors with whom it had built the project; in fact, diversity jurisdiction might have been destroyed if Baranello were joined with the other contractors.

of New Jersey; the Arbitration Act and the New Jersey state arbitration statute (N.J.S. 2A:24:8 and 9) both appeared to permit the arbitration panel to determine questions of contract interpretation and evidence. Moreover, the argument before the Appellate Division was held in November 1982, while the decision of this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ___U.S. ___, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983), which restated the applicability of the Arbitration Act to state court proceedings, was not rendered until February 1983; the Appellate Division's decision was rendered some five months later.

In the Supreme Court of New Jersey, Baranello's Petition for Certification compared the applicable state and federal standards of review and presented the court the question which this Court is now being asked to consider, but the Supreme Court of New Jersey denied Baranello's Petition without opinion.

ARGUMENT

The Arbitration Act Applies to this Case

There is no question that the construction contract between the City of Paterson, New Jersey, and Baranello, a New York contractor who used New York subcontractors in building a project in New Jersey, evidences "a transaction involving commerce" within the meaning of Sections 1 and 2 of the Arbitration Act, in light of the similar factual settings in other cases which have held the Arbitration Act applicable. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra; Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961); *Sears Roebuck & Co. v. Glenwal Co.*, 325 F.Supp. 86 (S.D.N.Y. 1970), *affirmed on opinion below*, 442 F.2d 1350 (2d Cir. 1971); *Burke Public Schools Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981). And, as this Court stated last year in *Moses H. Cone* and confirmed last month in *Southland Corp. v. Keating*, ___ U.S. ___, 52 U.S.L.W. 4131 (1984), "although enforcement of the Act is left in large part to the state courts, it nevertheless

represents federal policy to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra,* ___ U.S. at ___, 74 L.Ed.2d at 786, 103 S.Ct. at 942, n.32.

The Award Should Be Presumed Valid

This Court has never decided a case in which the merits of an award rendered pursuant to the Arbitration Act were at issue.* However, in discussing the powers of arbitrators in the context of deciding the proper forum for the hearing of a dispute, this Court, in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203, n.4 (1956), described the standards of review applied in a number of federal circuit court and state court decisions as follows:

> Whether the arbitrators misconstrued a contract is not open to judicial review. Questions of fault or neglect are solely for the arbitrators' consideration. Arbitrators are not bound by the rules of evidence. They may draw on their personal knowledge in making an award. Absent agreement of the parties, a written transcript of the proceedings is unnecessary. Swearing of witnesses may not be required. And the arbitrators need not disclose the facts or reasons behind their award. [All citations omitted]

Since that time, several circuit court decisions have reaffirmed that arbitration awards must be presumed to be valid, and that any party who contests the award bears the burden of establishing its invalidity by presenting clear and conclusive evidence that the result is irrational. *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978); *National Railroad Passenger Corp. v. Chesapeake and Ohio Railway Co.*, 551 F.2d 136 (7th Cir. 1977); *I/S Stavborg v. National Metal*

*In *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932), this Court upheld the constitutionality of the predecessor to the present Act, and upheld an award without discussion of its merit. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, *reh. den.* 393 U.S. 1112 (1968), an award was vacated because of a conflict of interest on the part of one of the arbitrators. Other decisions of this Court have reviewed arbitration awards rendered pursuant to the federal labor laws.

Converters, Inc., 500 F.2d 424 (2d Cir. 1974). Nevertheless, in the instant case, the holding below reflects the opposite presumption, *i.e.*, that in order for the award to be confirmed its proponent must demonstrate conclusively that the award can in no way include any items of damage which would be proscribed by local substantive law or by local rules of evidence. Certainly, in the case at bar, the City has not demonstrated that the award necessarily includes any item of damage which would not be recoverable in a court of law.

Thus, the issue in this case might be stated in terms of whether, under the Arbitration Act, an arbitration award must be presumed valid unless proven otherwise, or whether the award must be presumed to be erroneous unless its proponent can prove that it is correct in terms of what a state court would have ruled, at each stage of the proceedings. By presuming the award to be erroneous, the court below "has decided a federal question in a way in conflict with the decision of . . . a federal court of appeals," within the meaning of Rule 17(b) of this Court, and also "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court," within the meaning of Rule 17(c) of this Court. Accordingly, we respectfully submit that certiorari should be granted in the instant case.

The Record Supports The Award

Under the Arbitration Act, as discussed above, a reviewing court must confirm the award of the arbitrators unless the result is "irrational"; moreover, while an award could be vacated if it clearly appeared there was a "manifest disregard" for the law, it has been held that "[w]hatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contract do not appear one of them." *Andros Compania Maritima v. Marc Rich & Co.*, *supra*, 579 F.2d at 702-704.

In vacating the award of the arbitration panel in the instant case, the Appellate Division, in its opinion below (which

the Supreme Court of New Jersey refused to review), held as follows:

> The City raises a number of points on this appeal. We find merit in its contention that the arbitrators erred in refusing to exclude from consideration claims for damages for the period more than 20 days before the contractors first made written claims upon the City for delay damages. During the hearings, on December 17, 1980, the City moved to limit the claims for damage delay. Relying on various provisions in the contract's general conditions, the City's attorney argued:
>
> > Now, I feel that so much of the claim for delay as is earlier than 20 days before the letters started coming in should be deemed to have been waived and should not be part of this case. Now, with each contractor there was a different time sequence of events as to when they made their claims for delays, but I don't believe that any of them were earlier than the Fall of 1977, and I believe that they only really came in from all of them probably by December or January of 1978.
>
> In response, the attorneys for the contractors conceded that written claims for delay were not submitted promptly after problems in construction were encountered. Rather, they said that everyone knew there were delays and that construction was stalled, but their clients were more interested in getting the job done than in performing "paperwork." One attorney argued that notice was given of the "initial delays [due to] rock and water," and this was discussed at a job meeting as early as June 1977. The issue, however, was not whether the City had notice of the delays, but whether a contractor had given written

notice of a claim against the City for damages due to delay.

At the conclusion of the argument on the City's motion to limit the damage claims, the chairman of the arbitration panel advised the parties that the panel denied the motion. Since there was no breakdown of the awards to each contractor and the evidence before the arbitrators is not before us, we do not know the extent to which the awards include amounts for delay damage allegedly incurred more than 20 days before written demand for such damage claims were made.

___N.J. Super. at ___, ___A.2d at ___ (A. 7-8).

After referring to several technical "notice requirements" contained in six separate paragraphs of the construction contract, the Appellate Division in its decision below described the standard of review it was applying as follows:

While arbitrators have considerable discretion in determining disputes, especially in the private sector, arbitrators "may not disregard" the terms and conditions of the parties' agreement; it is that agreement which "delineates the scope of [their] authority." *In re Arbitration Between Grover and Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 230 (1979). An award that ignores contract provisions constitutes an imperfect execution of the arbitrators' authority and is deemed procured by "undue means" within the meaning of *N.J.S.A.* 2A: 24-8. *Id.*, 80 *N.J.* at 231. See also *State v. State Troopers Fraternal Ass'n*, 91 *N.J.* 464, 469 (1982), where the court said that arbitrators have broad discretion "but they may not disregard terms and conditions set forth in the agreement." *Accord, In re Arbitration Between Mary and William Harris*, 140 *N.J. Super.* 10, 15 (App. Div. 1976); *Belardinelli v. Werner Continental, Inc.*, 128 *N.J. Super.* 1 (App. Div. 1974); *United Steelworkers v. Enterprise Corp.*, 363 *U.S.* 593, 597, 80 *S.Ct.* 1358, 1361, 4 *L.Ed.2d* 1424, 1428 (1960). In the *United Steelwork-*

ers case, *supra*, the United States Supreme Court said:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.*]

In the case at hand the arbitrators were not free to ignore the contract time limitations for giving written notice of a claim for delay damage. Having knowledge of a problem causing delay is not the equivalent of having received written notice of a contractor's intention to make a damage claim for the delay. This is an important distinction.

* * *

The failure of the arbitrators to limit the contractors' claim in accordance with the contract provisions constitutes grounds for vacating the judgment ordering enforcement of the award. We cannot tell from the record before us the dates on which written demands were made for damages due to delays, nor can

> we determine to what extent the arbitrators' award included damages for periods of delay prior to the giving of such written notice. The award was not itemized or separated into different amounts for the separate categories of claims made by each contractor. Nor can we determine from the record before us the amount of damages claimed by any contractor for the period of delay that should have been disallowed because of the lack of written notice of a claim. Therefore, the entire arbitration award must be vacated and the matter remanded for a new arbitration proceeding.

____N.J.Super. at____, ____ A.2d at ____ (A. 9-11).

The contractual provisions on which the Appellate Division relied in vacating the award were paragraphs 12.1.6, 12.1.7 and 12.2.1 (A. 34-35), and, although neither the City nor the Appellate Division could point to a contract provision that expressly so provides, the court accepted the City's argument that the fair implication of those three provisions was to require the arbitrators "to exclude from consideration claims for damages for the period more than 20 days before the contractors first made written claims upon the City for delay damages." (A. 7-8). Paragraph 12.1.6 entitled Baranello to extra compensation in the event of concealed or unknown conditions below the surface of the ground upon "claim" by either party made within twenty days after the first observance of the conditions, and the decision below apparently inferred under paragraphs 12.1.7 and 12.2.1 that any such claim must be a "written claim."

The arbitrators' award, however, is not irrational and could be supported by any one of the following factors:

> (1) The arbitrators could easily have found that the claims in question, which represent only a fraction of Baranello's total claim, were not governed by paragraph 12.1.6 and were instead governed by paragraph 7.4.1, which only required written notice of claim "within a reasonable time" (A. 32-33). Paragraph 7.4.1 applies to damages suffered "because of any act or

omission of the other party or of any of his employees, agents or others for whose acts he is legally liable. . . ." Baranello presented evidence to the arbitrators showing that the City, its employees, or another contractor for whose acts the City was legally liable, had failed to disconnect a subsurface water line while preparing the site for construction.

(2) The arbitrators could easily have found that written notice was timely provided in Baranello's letters dated June 24, July 19 and September 27, 1977, or in the form of minutes to the job meetings held June 21, July 6, July 20, August 7 and November 15, 1977, the Architect having represented the City at such meetings pursuant to paragraph 2.2.2 of the general conditions and having received copies of the minutes. Once such evidence was submitted, it was within the province of the arbitrators to determine the sufficiency of the notice. See *E. C. Ernst, Inc. v. General Motors Corp.*, 482 F.2d 1047, 1054-1055 (5th Cir. 1973); *Brooks Towers Corp. v. Hunkin-Conkey Construction Co.*, 454 F.2d 1203 (10th Cir. 1972); *Montgomery Ward & Co. v. Robert Cagle Building Co.*, 265 F.Supp. 469, 472-474 (S.D.Tex. 1967).

(3) The arbitrators could easily have found that claims under paragraph 12.1.6 need not initially be made in writing, particularly in the absence of any reference in such paragraph to a "writing" (A. 34) and in light of paragraphs 1.2.5 and 2.2.6 regarding the functions of the Architect (A. 31). Moreover, under those paragraphs and under paragraphs 12.1.7 and 2.2.10 all questions and interpretations necessary for the proper execution or progress of the work were to be referred in the first instance to the Architect, and therefore it is apparent that no dispute existed between Baranello and the City, and thus no claim needed to be made, until after the Architect had either issued a written interpretation or had failed to render an interpretation of the job condition within a

reasonable time. See *Methodist Church of Babylon v. Glen-Rich Construction Corp.*, 27 N.Y.2d 357, 267 N.E.2d 88 (1971).

(4) The arbitrators could easily have found that any requirement of written notice was unenforceable due to waiver, estoppel or public policy, particularly in light of the City's failure to come forward and acknowledge that the City was the party responsible for the subsurface water condition, a fact which at that time was unknown to Baranello. Aside from general notions of good faith and fair dealing, *Restatement of Contracts (2d)* §205 (1981), the arbitrators could have found that under paragraph 12.1.6 it was in fact the City, and not Baranello, that had an obligation to give notice since it was the City that had made "the first observance of the conditions." See *Van Dusen Aircraft Supplies v. Terminal Const. Corp.*, 3 N.J. 321, 70 A.2d 65 (1949). See also *D.M. Holden, Inc. v. Contractor's Crane Service, Inc.*, 435 A.2d 529 (N.H. 1981); *Heiskell v. H.C. Enterprise, Inc.*, 244 Ark. 857, 429 S.W.2d 71 (1968).

The denial by the arbitration panel of the City's spontaneous oral motion for limitation of the issues, which was made during the middle of one of the arbitration hearings, is not surprising when one considers the various factors described above in the context of the decision in *Ace Stone, Inc. v. Wayne Township*, 47 N.J. 431, 221 A.2d 515 (1966); in that case the Supreme Court of New Jersey considered a construction contractor's right to recover damages for delays in light of a so-called "no damage" clause, and unanimously held as follows:

> The admitted goal is to ascertain and effectuate the contemplation or common intention of the parties. See *Tessmar v. Grosner*, 23 N.J. 193, 201 (1957). Towards that goal, formal interpretative rules are readily subordinated and parol evidence of the attendant circumstances including trade practices and customs is clearly admissible. [citing authorities].

> It appears to us that the just course now is to remand the proceeding to the Law Division to enable the parties to introduce such oral and documentary evidence as may be available and relevant in aid of interpretation. After all of the evidence is in, determination may fairly be made as to whether the language used in the contract by the parties, when considered in the full light of their relations and objectives, and the attendant circumstances, contemplated that the extension of time clause and the related clauses would preclude the plaintiff from asserting a claim for damages under the particular circumstances presented. The respective functions of the court and jury in connection with such determination have been fully set forth in the cases and in the secondary authorities and need not be restated here. [citing authorities].

47 N.J. at 439-440, 221 A.2d at 520.

Under such guidelines, it is difficult to see how the arbitrators could have granted the City's oral motion for limitation of the contractors' claims during the middle of the arbitration proceedings, and the arbitrators should certainly be afforded the power to consider all of the evidence at one time without the award thereby being presumed invalid for "possibly" including some prohibited item of damage. See *University of Alaska v. Modern Construction, Inc.*, 522 P.2d 1132 (Alaska 1974).

The Appellate Division in its decision below sought to reconcile its analysis with established legal principles by quoting a paragraph from this Court's labor law decision in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960) (see pp. 7-8, *supra*); however, the two paragraphs immediately following the language quoted by the Appellate Division state as follows:

> The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitra-

tor's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. * * *

* * * Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 4 L.ed. 2d 1403, 80 S.Ct. 1343, decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

363 U.S. at 597-599.

In light of such holding by this Court regarding the standard of review of arbitration awards issued pursuant to the labor laws

and the consistent holdings of the federal circuit courts relating to the Arbitration Act as described above, it is respectfully submitted that the decisions in the courts below can be explained only by the political realities involved when an out-of-state company attempts to enforce its rights against a local municipality in a local state court system. However, the constitutional mandate that Congress shall regulate the transaction of interstate commerce and the expression of Congressional intent embodied in the Arbitration Act require that such local political considerations be subordinated to established federal policy. This Court recently confirmed in *Southland Corp. v. Keating, supra*, that " 'the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.' " ___ U.S. at ___, 52 U.S.L.W. at 4135 (quoting with approval *Metro Industrial Painting Corp. v. Terminal Construction Corp., supra*, 287 F.2d at 387).

Certiorari Should Be Granted

It is respectfully submitted that this Court should not permit the state courts in New Jersey to disregard the intent of Congress described in *Southland Corp. v. Keating, supra*, or to ignore this Court's statements of policy set forth in its recent decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra*. In *Moses H. Cone*, which also involved arbitration under a construction contract, this Court held as follows:

> The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transation involving commerce . . . shall be valid, irrevocable, and enforceable, save

> upon such grounds as exist at law or in equity for the revocation of any contract." 9 USC § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. * * * The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

___ U.S. at ___, 74 L.Ed.2d at 785, 103 S.Ct. at 941-942 (footnotes omitted); see also footnotes 27, 32 and 34.

Taken literally, the decision below would require every arbitrator to petition a court to issue conclusions of law before the arbitrator could proceed with the taking of evidence. Surely, this is not what either Congress or the parties had in mind when it was agreed that disputes could be decided according to the practicalities of industry lay persons rather than the technicalities of lawyers and judges.

In light of the conflict between the decision below by the New Jersey court and the consistent holdings in the past by the various federal courts as described above, it is respectfully submitted that the failure to accord immediate review of the decision below might seriously erode the federal policy to the effect that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* Moreover, by granting the instant petition this Court will be in a position to decide, for the first time, the extent to which a court may review the merits of a dispute after an award has been rendered pursuant to the Arbitration Act.

Thus, if the decision below is allowed to stand unaddressed by this Court, state courts will feel free to compel an out-of-state company to proceed with arbitration of "all claims, disputes and other matters arising out of or related to the contract," as happened in this case, to compel the parties to hold twenty-

three arbitration hearings over the course of a year, as happened in this case, and then to vacate the arbitration award on the basis that "we do not know the extent to which the awards include" amounts for certain damages which the state court would not have awarded under its own interpretation of various technical and ambiguous provisions of the contract and compel the parties to return to "a new arbitration proceeding" more than five years after the arbitration demands were originally served, as happened in this case, there to start the process all over again; no doubt, if history is any guide to the future, the parties to the instant case will return to the court system upon the issuance of a new arbitration award, for yet another round of litigation, unless this Court puts a long overdue end to it now. To avoid relegating the entire arbitration process to the status of a Sisyphean labor, certiorari should be granted in the instant case so that this Court may clearly set forth the standards for judicial review of arbitration awards, in advance of the proliferation of arbitration proceedings which undoubtedly will follow in the wake of this Court's decisions in *Moses H. Cone* and *Southland Corp.* Quite obviously, the colossal waste of time, effort and money which has resulted from the New Jersey courts' treatment of the instant matter could be multiplied by the thousandfold over the course of the next several years if the decision below is permitted to stand unaddressed by this Court.

CONCLUSION

The instant Petition for Certiorari to the Supreme Court of New Jersey should be granted.

Dated: Washington, D.C.
February 27, 1984

JOHN B. TACKE, ESQ.
Attorney for Petitioner
Hudson, Creyke, Koehler & Tacke
1744 R Street, N.W.
Washington, D.C. 20009
(202) 483-2500

APPENDIX

APPENDIX A

No. 21,697
Supreme Court of New Jersey
September Term 1982

J. BARANELLO & SONS, INC.,
Plaintiff-Petitioner,

and

CONSOLIDATED PRECAST, INC.,
Plaintiff,

and

INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,
Plaintiff,

and

DAVIDSON & HOWARD PLUMBING & HEATING, INC., etc.,
Plaintiff,

and

THE CONDITIONING CO., INC., etc.,
Plaintiff,

vs.

CITY OF PATERSON,
Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1331-81T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of November, 1983.

/s/

Stephen Townsend

Clerk

FILED
Supreme Court
Nov 28 1983

/s/

Stephen Townsend

Clerk

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1331-81T2

J. BARANELLO & SONS, INC.,
Plaintiff-Respondent,

v.

CITY OF PATERSON,
Defendant-Appellant.

CONSOLIDATED PRECAST, INC.,
Plaintiff-Respondent,

v.

CITY OF PATERSON,
Defendant-Appellant.

INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,
Plaintiff-Respondent,

v.

CITY OF PATERSON,
Defendant-Appellant.

DAVIDSON & HOWARD PLUMBING & HEATING, INC., A New Jersey Corporation,

Plaintiff-Respondent,

v.

CITY OF PATERSON,

Defendant-Appellant.

THE CONDITIONING CO., INC., a corporation of the State of New Jersey,

Plaintiff-Respondent,

v.

CITY OF PATERSON,

Defendant-Appellant.

Argued November 9, 1982–Decided August 2, 1983

Before Judges Botter and Brody

On appeal from Superior Court, Law Division, Passaic County.

Henry Ramer argued the cause for appellant.

Nathan H. Sisselman argued the cause for respondent, J. Baranello & Sons, Inc. (Sisselman and Nitti, Attorneys; Mr. Sisselman, on the brief).

Theodore W. Geiser argued the cause for respondent, Independent Electrical Construction Co., Inc. (Connell, Foley & Geiser, Attorneys; John F. Neary, on the brief).

Richard L. Abramson argued the cause for respondent, Consolidated Precast, Inc. (Peckar & Abramson, Attorneys; Mr. Abramson, on the brief).

Alfred J. Zazella argued the cause for respondent, Davidson & Howard Plumbing & Heating, Inc. (Zazella & Singer, Attorneys; Mr. Zazella on the brief).

Arnold L. Simon argued the cause for respondent, The Conditioning Co., Inc.

PER CURIAM

The City of Paterson (City) appeals from a judgment in these consolidated actions affirming and reducing to judgment an arbitrators' award requiring the City to pay various sums of money to five separate prime contractors engaged in the construction of a project known as the Administration Building of the (Paterson) Public Safety Complex.[1] The arbitrators' award totalled approximately $3 million. The award for each contractor was stated to represent:

> all retainage due under the contract between the Parties, plus the amount resulting from delays and unresolved changes, where applicable, less any liquidated damages assessed against the contractor.

In late April 1977, separate contracts were entered into (see *N.J.S.A.* 40A:11-16) for the construction of an office building to house the police and fire departments of the City of Paterson. The contracts were as follows:

Contractor	*Nature*	*Amount*
J. Baranello & Sons, Inc. (Baranello)	general construction	$2,577,300
Consolidated Precast, Inc. (Consolidated)	precast concrete	$ 671,079
Independent Electrical Construction Co., Inc. (Independent)	electrical	$ 493,394
Davidson & Howard Plumbing & Heating, Inc. (D & H)	plumbing	$ 203,900
The Conditioning Co., Inc. (Conditioning)	heating, ventilating & air conditioning	$ 896,000
	Total	$4,841,673

[1] By consent, the judgment reflects a deduction from the award to J. Baranello & Sons, Inc. to reflect payments by the City of $212,300.93 out of its retainage subsequent to the last arbitration hearing date.

The work was to commence on May 1, 1977 and the contracts specified a time for completion (generally, 540 days). Liquidated damages of $250 per day were called for in case the work was not completed in time. However, at an early stage of construction problems were encountered which delayed the construction. An affidavit submitted to the trial court described the causes of delay as the discovery of rock at the excavation site, large accumulations of water (apparently caused by a water main owned by the Passaic Valley Water Commission), and disputes among contractors. Delay-causing problems were discussed and were the subject of letters written by contractors. While extensions of time for completion were sought by some contractors presumably to avoid liquidated damage claims against them for failing to complete their work on time, the City contends that no contractor made a written claim against the City for delay damages until on or about December 1, 1977. Later, in April and June 1978, respondents D & H and Conditioning demanded arbitration seeking extra compensation for the delay encountered on the job. D & H's demand for arbitration stated the relief sought as follows:

> Claimant seeks an extension of time under its contract for delays and an adjustment of its contract price for all damages sustained by reason of increased and additional costs, expenses and time incurred as a result of respondent's breaches of contract. The monetary amount of this claim is not as yet fully determined since the delays continue to date. This tribunal will be advised when all costs have been determined.

We are told that the City filed its own demand for arbitration against Baranello for delay claims and for indemnification on the other claims. This resulted in separate litigation that was the subject of a prior appeal. *J. Baranello & Sons, Inc. v. Paterson*, 168 *N.J. Super.* 502 (App. Div.) certif. den. 81 *N.J.* 340 (1979). Ultimately, the arbitrators made awards to each contractor payable by the City. Separate actions, which were consolidated were brought by each contractor to enforce the awards. The awards were as follows:

Baranello		$1,736,500
Consolidated		296,900
Independent		482,950
D & H		202,100
Conditioning		316,800
	Total	$3,035,250[2]

The City raises a number of points on this appeal. We find merit in its contention that the arbitrators erred in refusing to exclude from consideration claims for damages for the period more than 20 days before the contractors first made written claims upon the City for delay damages. During the hearings, on December 17, 1980, the City moved to limit the claims for damage delay. Relying on various provisions in the contract's general conditions, the City's attorney argued:

> Now, I feel that so much of the claim for delay as is earlier than 20 days before the letters started coming in should be deemed to have been waived and should not be part of this case. Now, with each contractor there was a different time sequence of events as to when they made their claims for delays, but I don't believe that any of them were earlier than the Fall of 1977, and I believe that they only really came in from all of them probably by December or January of 1978.

In response, the attorneys for the contractors conceded that written claims for delay were not submitted promptly after problems in construction were encountered. Rather, they said that everyone knew there were delays and that construction was stalled, but their clients were more interested in getting the job done than in performing "paperwork." One attorney argued that notice was given of the "initial delays [due to] rock and water," and this was discussed at a job meeting as early as June 1977. The issue, however, was not whether the City had notice of the

---

[2] We were told at oral argument that the total cost to the City was increased by these awards from the contract amount of $4.84 million to approximately $7.5 million. This cannot be verified from the abbreviated record before us.

delays, but whether a contractor had given written notice of a claim against the city for damages due to delay.

At the conclusion of the argument on the City's motion to limit the damage claims, the chairman of the arbitration panel advised the parties that the panel denied the motion. Since there was no breakdown of the awards to each contractor and the evidence before the arbitrators is not before us, we do not know the extent to which the awards include amounts for delay damage allegedly incurred more than 20 days before written demand for such damage claims were made.

Paragraph 8.3.1 of the general conditions allows for extensions of time for completion when a contractor is delayed by an act or neglect of the owner (the City) or the architect or by a separate contractor engaged by the owner. Par. 8.3.2 requires all "claims for extension of time" to be made "no more than twenty days after the occurrence of the delay; otherwise they shall be waived," except that only one claim is necessary for a continuing cause of delay. Par. 12.1.6 provides for an adjustment by change order on claim of either party for a subsurface condition not conforming to contract documents. A claim for such adjustment must also be made within 20 days of "first observance" of the condition. Demand for added costs due to a stop work order not caused by the contractor's fault or other causes must also be made in writing within 20 days after the occurrence giving rise to the demand. Paragraphs 12.1.7 and 12.2.1. Par. 8.3.4 provides that par. 8.3 dealing with extensions of time for completion "does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents."

An arbitration award must be confirmed, *N.J.S.A.* 2A:24-7, unless it may be vacated, modified or corrected pursuant to the provisions of *N.J.S.A.* 2A:24-8 and 9. *N.J.S.A.* 2A:24-8(a), (c) and (d) allow an award to be vacated when it has been procured by "undue means" or through misconduct of the arbitrators in refusing to hear evidence pertinent and material to the controversy or where the arbitrators "exceeded or so imperfectly executed their powers that a mutual, final and definite award . . . was not made." While arbitrators have considerable discretion

in determining disputes, especially in the private sector, arbitrators "may not disregard" the terms and conditions of the parties' agreement; it is that agreement which "delineates the scope of [their] authority." *In re Arbitration Between Grover and Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 230 (1979). An award that ignores contract provisions constitutes an imperfect execution of the arbitrators' authority and is deemed procured by "undue means" within the meaning of *N.J.S.A.* 2A:24-8. *Id.*, 80 *N.J.* at 231. See also *State v. State Troopers Fraternal Ass'n*, 91 *N.J.* 464, 469 (1982), where the court said that arbitrators have broad discretion "but they may not disregard terms and conditions set forth in the agreement." *Accord, In re Arbitration Between Mary and William Harris*, 140 *N.J. Super.* 10, 15 (App.Div.1976); *Belardinelli v. Werner Continental, Inc.*, 128 *N.J.Super.*1(App.Div.1974); *United Steelworkers v. Enterprise Corp.*, 363 *U.S.* 593, 597, 80 *S.Ct.* 1358, 1361, 4 *L.Ed.*2d 1424, 1428 (1960). In the *United Steelworkers* case, *supra*, the United States Supreme Court said:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id.*]

In the case at hand the arbitrators were not free to ignore the contract time limitations for giving written notice of a claim for

delay damage. Having knowledge of a problem causing delay is not the equivalent of having received written notice of a contractor's intention to make a damage claim for the delay. This is an important distinction. Contractors and an owner may ruminate leisurely about means for correcting a problem that causes delay on a project. Alternative courses may be considered, and the parties may appear to be very cooperative in finding a solution. But the owner's conduct may be strongly influenced by the fact that a contractor has made a written demand for damages due to the delay. The written demand may inspire the owner or another contractor to move more swiftly. It also puts the parties against whom the claim is made on notice to take appropriate measures to guard against the damage claim. It may prompt the contemporaneous gathering of evidence bearing on the issue of the cause for the delay or the amount of damages incurred. Thus, there is good reason for enforcing contract requirements for written notice of claims.

We also note the distinction between a demand pursuant to par. 8.3.2 for an extension of time to complete the work and a demand for damages due to delay. This distinction is expressly recognized by par. 8.3.4, noted above.

The City does not take the position that no claims for damage delay could be asserted by respondents because of their failure to give notice within 20 days after the occurrence of the event causing the delay. Rather, the City would bar claims for delay for that period of time that passed more than 20 days before the notice of a claim for damage is given. We agree with the City's contention that the failure to make a claim in writing for damage delay constitutes a waiver of the claim for the amount of delay that precedes the notice by more than 20 days.

The failure of the arbitrators to limit the contractors' claim in accordance with the contract provisions constitutes grounds for vacating the judgment ordering enforcement of the award. We cannot tell from the record before us the dates on which written demands were made for damages due to delays, nor can we determine to what extent the arbitrators' award included damages for periods of delay prior to the giving of such written

notice. The award was not itemized or separated into different amounts for the separate categories of claims made by each contractor. Nor can we determine from the record before us the amount of damages claimed by any contractor for the period of delay that should have been disallowed because of the lack of written notice of a claim. Therefore, the entire arbitration award must be vacated and the matter remanded for a new arbitration proceeding.

Because of this disposition it is not necessary for us to dwell at length on the other points raised by the City. The City complains that it was entitled to counsel fees under par. 6.2.3 of the general conditions on the aspect of the arbitration proceeding which involved its claim for liquidated damages against a contractor. It complains that it was not permitted to prove the amount of counsel fees that might be awarded. However, par. 6.2.3 applies to damage caused by a contractor to the "work or property" of another contractor, and the right of the City to counsel fees relates to the City's involvement in that claim. Whether or not this provision would apply to the damage claim of a contractor against the City in this case is a matter for interpretation by the arbitrators. There is no way of knowing how they dealt with this issue. The transcript of the hearing when the City's claim for counsel fees was discussed suggests some confusion on the part of the arbitrators to the extent that the comments of the panel's chairman suggested the impression that all parties were seeking counsel fees in connection with the arbitration.[3] However, the discussion was of a preliminary nature. The arbitrators indicated that they would study the case and would call the parties back if necessary to determine how to apportion counsel fees. On the state of this record we must presume that the arbitrators made no error on this issue.

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[3] An affidavit submitted to the trial court states that at the final hearing it was agreed that all parties could submit a claim to the arbitrators for attorneys fees. No issue on this aspect has been raised on appeal. We cannot verify this statement from the record before us, and we have not sought to determine whether any authority exists for such an award except for the City's reference to par. 6.2.3 in support of its own claim.

The City also contends that the form of the award is defective because it did not provide a breakdown for the awards due to the delay caused by water on the site or by other factors. A breakdown of the award would have been helpful but is not indispensable. Because the award is vacated it is not necessary for us to decide whether the trial judge improperly exercised his discretion, as the City contends, in allowing interest on the arbitrators' award. *See Elizabeth Police Superior Officers Ass'n. v. Elizabeth*, 180 *N.J.Super.* 511, 518–519 (App.Div.1981); *Ukranian National Urban Renewal Corp. v. Joseph F. Muscarelle, Inc.*, 151 *N.J.Super.* 386, 402–403 (App.Div.), certif. den. 75 *N.J.* 529 (1977). It is also unnecessary for us to consider the City's right to continue to retain funds to guarantee performance of punch list items. With respect to this contention, the issue of incomplete work or incorrect work should have been presented by the City to the arbitrators so that they could fully determine all claims between the parties. The arbitrators' award recites that it made allowance for retainage. Therefore, we assume that the arbitrators did not intend the City to continue to withhold any funds. On the other hand, a copy of D & H's demand for arbitration contained in the appendix shows only a claim for damages sustained by reason of increased and additional costs and expenses incurred as a result of the City's breaches of contract. It is not clear from the record before us whether the City sought to present to the arbitrators any claim it had for incomplete work by a contractor for which it might have the right to retain funds under contract provisions. However, any confusion about the scope of arbitration can be avoided on the remand, when all issues among the parties can be presented and finally resolved.

Lastly, we consider the question of liens asserted by subcontractors to funds owed by the City to the contractors. The contractors assert that they do not intend to have the City pay twice for the same work, once to them and again to a subcontractor in satisfaction of its lien. Correspondence has been submitted to us showing that the attorneys for Baranello agreed to retain $48,203.43 out of funds due from the City as security for a claim by its subcontractor, Sunrise Plastering. In view of the

position taken by the contractors, the parties should be able to provide by stipulation for payment of subcontractor's liens out of moneys due from the City without intervention by the arbitrators or the court.

The judgments affirming the arbitrators' award is reversed, and the award is vacated. The matter is remanded for further arbitration proceedings. We do not retain jurisdiction.

APPENDIX C

ARNOLD L. SIMON
2 W. Northfield Road
Livingston, N.J. 07039
(201) 992-3200
Attorney for Plaintiff
The Conditioning Co., Inc.

J. BARANELLO & SONS, INC., *Plaintiff* v. CITY OF PATERSON, *Defendant*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION—PASSAIC COUNTY DOCKET NO. L-11815-81 CIVIL ACTION ORDER OF JUDGMENTS
CONSOLIDATED PRECAST, INC. *Plaintiff* v. CITY OF PATERSON, *Defendant*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION—PASSAIC COUNTY DOCKET NO. L-11814-81 CIVIL ACTION ORDER OF JUDGMENTS
INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC., *Plaintiff* v. CITY OF PATERSON, *Defendant*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION—PASSAIC COUNTY DOCKET NO. L-11816-81 CIVIL ACTION ORDER OF JUDGMENTS

DAVIDSON & HOWARD PLUMBING & HEATING, INC., a New Jersey Corporation, *Plaintiff* v. CITY OF PATERSON, *Defendant*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION—PASSAIC COUNTY DOCKET NO. L-11820-81 CIVIL ACTION ORDER OF JUDGMENTS
THE CONDITIONING CO., INC., a corporation of the State of New Jersey, *Plaintiff,* v. CITY OF PATERSON, *Defendant*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION—PASSAIC COUNTY DOCKET NO. L-11839-81 CIVIL ACTION ORDER OF JUDGMENTS

These consolidated matters having come before the Court on Friday, November 13, 1981, being the return date of Orders to Show Cause why Judgment should not be entered in favor of the five plaintiffs and being also the return date of Cross Motion by the City of Paterson, defendant in each of the consolidated matters, seeking vacation, modification or correction of the Award of Arbitrators, and the Court having reviewed the Verified Complaints, certifications and affidavits, and Memoranda of Law submitted by all counsel, and having had the benefit of oral argument, Nathan Sisselman, Esq., of Sisselman and Nitti, Esqs., appearing on behalf of plaintiff J. Baranello & Sons, Inc., Richard Abramson, Esq. of Peckar & Abramson, Esqs., appearing on behalf of plaintiff, Consolidated Precast, Inc., Edward Deutsch, Esq. of Connell, Foley & Geiser, Esqs., appearing on behalf of plaintiff, Independent Electrical Construction Co., Inc., Alfred Zazella, Esq. of Zazella & Singer, Esqs., appearing on behalf of plaintiff, Davidson & Howard Plumbing & Heating, Inc., Arnold L. Simon, Esq., appearing on behalf of plaintiff, The Conditioning Co., Inc., and Henry Ramer, Esq., appearing on behalf of defendant, the City of Paterson; and the Court having considered the aforesaid submission as well as the previously reported decision of the Superior Court of New Jersey, Appellate Division; and

It further appearing, that the sum of $212,300.93 has been paid by defendant, the City of Paterson, to plaintiff, J. Baranello & Sons, Inc., which payment is agreed by respective counsel to be a valid deduction from the Award of arbitration in favor of said J. Baranello & Sons, Inc.; and good cause being shown

It is on this 23 day of November, 1981

ORDERED AND ADJUDGED, that the arbitration awards in favor of plaintiffs be and are hereby reduced to Judgments, which Judgments are as follows:

Judgment in favor of J. Baranello & Sons, Inc. and against the City of Paterson in Docket No. L-11815-81 in the sum of $1,524,199.07;

Judgment in favor of plaintiff, Consolidated Precast, Inc. and against defendant, City of Paterson, in Docket No. L-11814-81 in the sum of $296,900.00;

Judgment in favor of plaintiff, Independent Electrical Construction Co., Inc. and against defendant, City of Paterson, in Docket No. L-11816-81 in the sum of $482,950.00;

Judgment in favor of plaintiff, Davidson & Howard Plumbing & Heating, Inc. and against defendant, City of Paterson, in Docket No. L-11820-81 in the sum of $202,100.00;

Judgment in favor of plaintiff, The Conditioning Co., Inc. and against defendant, City of Paterson, in Docket No. L-11839-81 in the sum of $316,800.00;

It is FURTHER ORDERED AND ADJUDGED, that the aforesaid Judgments shall bear interest from October 19, 1981; and,

It is FURTHER ORDERED, that the relief sought in the Cross Motion by the City of Paterson be and is hereby denied; and,

It is FURTHER ORDERED, that application made by counsel for the City of Paterson, in open Court, for stay of the Judgments recited above, be and is hereby denied.

/s/ Peter Ciolino
PETER CIOLINO, A.J.S.C.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5178-77

J. BARANELLO & SONS, INC.,
Plaintiff-Appellant,

v.

CITY OF PATTERSON,
Defendant-Third Party Plaintiff-Respondent,

v.

DAVIDSON & HOWARD PLUMBING & HEATING, INC., THE CONDITIONING COMPANY, INC., and INDEPENDENT ELECTRICAL CONSTRUCTION CO. INC.,
Third-Party Defendants-Respondents.

Submitted May 7, 1979 — Decided May 25, 1979

Before Judges ALLCORN, SEIDMAN and BOTTER.

Messrs. Sisselman & Nitti, attorneys for appellant (*Mr. Nathan I. Sisselman* on the brief).

Mr. Henry Ramer, attorney for respondent City of Paterson.

No briefs were filed on behalf of third-party defendants-respondents.

PER CURIAM. The City of Paterson entered into a number of prime contracts for the construction of a project described as "The Administration Building of The Public Safety Complex." Thereafter, three of the contractors, Davidson & Howard Plumbing & Heating Inc., The Conditioning Company, Inc.

and Independent Electrical Construction Co. Inc., joined herein as third-party defendants, filed written demands for arbitration against the city pursuant to the arbitration clause contained in the contract documents. Each claimed it was delayed through no fault of its own in the performance of its contract, and sought as relief an extension of time for performance and an adjustment or revision of its contract price because of increased costs for materials and labor and other expenses incurred.

Thereupon, the city filed a demand for arbitration against plaintiff herein, the contractor for general construction. The claim asserted was "[d]efense and if necessary, indemnification on claims brought by other primes; money damages in undetermined amount due to delay in construction of building." The authority for arbitrating the dispute was stated to be "the contract between it and Baranello, and especially under Art. 6.2.3 of the General Conditions * * *." The city alleged that it and the other prime contractors incurred delays because of Baranello's failure to fulfill its obligations under the contract.

Plaintiff filed a complaint in Chancery Division for an adjudication that the relief sought by defendant city was not an arbitrable issue under the contract and to enjoin the city from proceeding with its arbitration demand. An order was entered directing defendant to show cause why the arbitration should not be restrained. Pending the hearing on the order the city brought the third-party defendants into the lawsuit by third-party complaint. After hearing the argument on the return day of the order to show cause, the trial judge determined that the contract did not preclude the city's demand for arbitration. Judgment was entered dismissing the complaint and the third-party complaint. Plaintiff appealed.

The rationale of the trial judge's oral opinion was predicated upon his concept that Article 6.2.3 of the General Conditions of the contract was applicable and also his reliance upon *Dobson v. Rutgers, State University* 157 *N.J. Super.* 357 (Law Div. 1978). This article provided, in substance, that if the contractor should "cause damage to the work or property of any separate contractor on the Project," such contractor would be obligated

to endeavor to settle the claim of the other contractor "by agreement or arbitration," and, if the other contractor should sue the owner or initiate arbitration proceedings, to defend such proceedings and pay any judgment or award against the owner. The trial judge was of the view that a "fair reading" of the cited article, as well as *Dobson*, supported the view that the parties intended the article to apply to any "delay damages." He rejected plaintiff's further arguments that the liquidated damage clause in the contract was in lieu of other damage claims; that the arbitration demands of the third party were premature, and that the city's claim against plaintiff should have been referred first to the architect for decision.

Plaintiff advances on this appeal essentially the same arguments as it did below, though couched in somewhat different language. Although we do not subscribe to the trial judge's rationale or approach to this case, we are nevertheless satisfied from our review of the record that the judgment should be affirmed.

There is a question whether the city's demand for arbitration of its claim against plaintiff for indemnification is, on the facts here present, correctly founded on Article 6.2.3 of the General Conditions. The comparable contract provision in *Dobson*, which empowered the owner to seek such indemnification from the general contractor with respect to any claim asserted against the owner by any subcontractor, applied to situations where "through the acts or omissions of the contractor, any other contractor or any subcontractor shall *suffer loss or damage on the work* * * * " (emphasis supplied). Here, however, as indicated, the right to indemnification is triggered where "the Contractor cause[s] damage *to the work or property of any separate contractor* on the project * * * " (emphasis supplied), and such other contractor sues the owner or initiates an arbitration proceeding against it. It can be argued with some logic that under the *Dobson* contract the loss or damage suffered by a subcontractor could be from any cause, including delays chargeable to the general contractor, whereas here the provision envisages only actual physical damage to another contractor's "work or property." But we need not resolve that issue because we are of the view that

the claim asserted against plaintiff by the city would be arbitrable under another article in the contract.

Article 7.10.1 of the General Conditions provides in pertinent part as follows:

> All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Architect's decision on matters relating to artistic effect * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. * * *

Our courts have often said that public policy strongly favors arbitration, see *Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp.*, 131 *N. J. Super.* 159, 166 (App. Div. 1974). It follows, therefore, that an agreement relating to arbitration should be read liberally "to find arbitrability if reasonably possible." *Moreira Constr. Co. v. Wayne Tp.*, 98 *N. J. Super.* 570, 576 (App. Div. 1968). certif. den. 51 *N. J.* 467 (1968). The arbitration clause contained in Article 7.10.1 is broad in scope. It covers *all* claims, disputes and other matters arising out of *or related to* the contract. *Cf. Ukrainian Nat. Urban Renewal v. Muscarelle, Inc.*, 151 *N. J. Super.* 386, 398 (App. Div. 1977), certif. den. 75 *N. J.* 529 (1977). There can be no doubt that the city has asserted a claim against plaintiff which arises out of or is related to the contract between them, and is, therefore, arbitrable under the broad language of Article 7.10.1. There is also a clear interrelationship between plaintiff's obligation to the city under its contract and the claims asserted by other contractors against the city. Since the latter stem from delays allegedly caused by plaintiff, and the other contractors have resorted to arbitration to obtain the desired relief, and since the city has also availed itself of the arbitration mechanism to seek indemnification from plaintiff, and also to assert its own claim for money damages resulting from the alleged delay, common sense dictates that all the

claims should be heard and decided together in one forum, the arbitration proceeding.

We discern no merit in plaintiff's other stated reasons for enjoining arbitration. To the extent that our comment may be relevant to any particular contention, we simply note that liability should not be confused with arbitrability, *Ukranian Nat. Urban Renewal v. Muscarelle, Inc., supra* at 399. Moreover, nothing that we have said hereinabove is to be construed as an expression on the merits of any substantive claim or defense.

Affirmed.

APPENDIX E

THE ARBITRATION ACT

The sections of the Arbitration Act which are most pertinent to the issues presented by this case are as follows:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiciton; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

• • •

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party * * *.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

• • •

§ 13. Papers filed with order on motion; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon,

also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

APPENDIX F

SISSELMAN & NITTI
Counsellors at Law
349 E. Northfield Rd.
Livingston, N. J. 07039
(201) 992-7363
Attorneys for Plaintiff.

SUPERIOR COURT OF NEW JERSEY
PASSAIC COUNTY, LAW DIVISION
DOCKET NO. L-

J. BARANELLO & SONS, INC.

Plaintiff,

vs.

CITY OF PATERSON

Defendant.

CIVIL ACTION
COMPLAINT

Plaintiff, J. Baranello & Sons, Inc., having its principal place of business at 331 Willis Avenue, Mineola, New York, complaining of the defendant herein says:

1. Pursuant to arbitration demands made by plaintiff and defendant and the appointment of a board of arbitrators through the American Arbitration Association in accordance with said demands made, plaintiff and defendant appeared before the chosen board of arbitrators with respective witnesses and the board of arbitrators conducted hearings on the matters in difference.

2. On October 21, 1981 the American Arbitration Association dispatched to counsel for the respective parties the award of the board of arbitrators and said award was received on or about October 23, 1981 as attached hereto and made a part hereof.

3. The award of the arbitrators attached hereto, is that plaintiff is entitled to the sum of $1,736,500.00 from the defendant.

4. This action is commenced within three months of the determination of said award and plaintiff moves to confirm same in this court in accordance with the Statutes made and provided.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $1,736,500.00 as provided in the terms of the award and costs of this action.

SISSELMAN & NITTI
Attorneys for Plaintiff
BY_____
NATHAN H. SISSELMAN

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL
In the Matter of the Arbitration between
INDEPENDENT ELECTRICAL
CONSTRUCTION CO., INC.
AND
DAVIDSON & HOWARD PLUMBING & HEATING, INC.
AND
CITY OF PATERSON
AND
THE CONDITIONING CO., INC.
AND
CONSOLIDATED PRECAST, INC.
AND
J. BARANELLO & SONS, INC.

CASE NUMBER: 18 10 0091 78

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and the Parties having agreed, pursuant to Section 20 of the Rules, to proceed with two Arbitrators and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

1. CITY OF PATERSON shall pay to J. BARANELLO & SONS the sum of ONE MILLION SEVEN HUNDRED THIRTY-SIX THOUSAND FIVE HUNDRED DOLLARS ($1,736,500.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays, and unresolved changes, where applicable, less any liquidated damages assessed against the contractor.

2. CITY OF PATERSON shall pay to CONSOLIDATED PRECAST, INC. the sum of TWO HUNDRED NINETY-SIX THOUSAND NINE HUNDRED DOLLARS ($296,900.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays, and unresolved changes, where applicable.
3. CITY OF PATERSON shall pay to INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC. the sum of FOUR HUNDRED EIGHTY-TWO THOUSAND NINE HUNDRED FIFTY DOLLARS ($482,950.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays and unresolved changes, where applicable, less any liquidated damages assessed against the contractor.
4. CITY OF PATERSON shall pay to DAVIDSON & HOWARD PLUMBING & HEATING, INC. the sum of TWO HUNDRED TWO THOUSAND ONE HUNDRED DOLLARS ($202,100.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays and unresolved changes, where applicable, less any liquidated damages assessed against the contractor.
5. CITY OF PATERSON shall pay to THE CONDITIONING CO., INC. the sum of THREE HUNDRED SIXTEEN THOUSAND EIGHT HUNDRED DOLLARS ($316,800.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays and unresolved changes, where applicable, less any liquidated damages assessed against the contractor.
6. The fee for Arbitrator compensation shall be borne equally by the Parties and shall be paid as directed by the Association.
7. The Administrative fees and/or expenses of the American Arbitration Association shall be borne equally by the Parties and shall be paid as directed by the Association.
8. This Award is in complete settlement of all claims and counterclaims submitted to this arbitration.

/s/ Robert J. Arnold
ROBERT J. ARNOLD

/s/ Mary A. Fisher

STATE OF New Jersey

ss:

COUNTY OF Middlesex

On this 8th day of October, 1981, before me personally came and appeared ROBERT J. ARNOLD, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ Daniel L. Bach
DANIEL L. BACH

/s/ [illegible]

STATE OF New Jersey

ss:

COUNTY OF

On this [illegible] day of October, 1981, before me personally came and appeared DANIEL L. BACH, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

APPENDIX H

THE CONTRACT

The sections of the contract which are pertinent to the issues presented by this petition are as follows:

GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

• • •

1.2.5 Written interpretations necessary for the proper execution or progress of the Work, in the form of drawings or otherwise, will be issued with reasonable promptness by the Architect and in accordance with any schedule agreed upon. Either party to the Contract may make written request to the Architect for such interpretations. Such interpretations shall be consistent with and reasonably inferable from the Contract Documents, and may be effected by Field Order.

• • •

2.2.2 The Architect will be the Owner's representative during construction and until final payment. The Architect will have authority to act on behalf of the Owner to the extent provided in the Contract Documents, unless otherwise modified by written instrument which will be shown to the Contractor. The Architect will advise and consult with the Owner, and all of the Owner's instructions to the Contractor shall be issued through the Architect.

• • •

2.2.6 The Architect will be, in the first instance, the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor. The Architect will, within a reasonable time, render such interpretations as he may deem necessary for the proper execution or progress of the Work.

• • •

2.2.10 Any claim, dispute or other matter that has been referred to the Architect, except those relating to artistic effect as provided in Subparagraph 2.2.9 and except any which have been waived by the making or acceptance of final payment as provided in Subparagraphs 9.7.5 and 9.7.6, shall be subject to arbitration upon the written demand of either party. However, no demand for arbitration of any such claim, dispute or other matter may be made until the earlier of:

2.2.10.1 The date on which the Architect has rendered his written decision, or

.2 the tenth day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his written decision by that date.

• • •

6.2.3 Should the Contractor cause damage to the work or property of any separate contractor on the Project, the Contractor shall, upon due notice, settle with such other contractor by agreement or arbitration, if he will so settle. If such separate contractor sues the Owner or initiates an arbitration proceeding on account of any damage alleged to have been so sustained, the Owner shall notify the Contractor who shall defend such proceedings at the Owner's expense, and if any judgment or award against the Owner arises therefrom the Contractor shall pay or satisfy it and shall reimburse the Owner for all attorneys' fees and court or arbitration costs which the Owner has incurred.

• • •

7.4.1 Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the other party or of any of his

employees, agents or others for whose acts he is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

7.10 ARBITRATION

• • •

7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.7.5 and 9.7.6, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

• • •

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by any cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 All claims for extension of time shall be made in writing to the Architect no more than twenty days after the occurrence of the delay; otherwise they shall be waived. In the case of a continuing cause of delay only one claim is necessary.

8.3.3 If no schedule or agreement is made stating the dates upon which written interpretations as set forth in Subparagraph 1.2.5 shall be furnished, then no claim for delay shall be allowed on account of failure to furnish such interpretations until fifteen days after demand is made for them, and not then unless such claim is reasonable.

8.3.4 This Paragraph 8.3 does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents.

• • •

12.1.6 Should concealed conditions encountered in the performance of the Work below the surface of the ground be at variance with the conditions indicated by the Contract Documents or should unknown physical conditions below the surface of the ground of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract, be encountered, the Contract Sum shall be equitably adjusted by Change Order upon claim by either party made within twenty days after the first observance of the conditions.

12.1.7 If the Contractor claims that additional cost is involved because of (1) any written interpretation issued pursuant to Subparagraph 1.2.5, (2) any order by the Owner to stop the Work pursuant to Paragraph 3.3 where the Contractor was not at fault, or (3) any written order for a minor change in the Work issued pursuant to Paragraph 12.3, the Contractor shall make such claim as provided in Paragraph 12.2.

12.2 CLAIMS FOR ADDITIONAL COST

12.2.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the contractor before proceeding to execute the Work, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Subparagraph 10.3.1. No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

Office - Supreme Court, U.S.
FILED
MAY 22 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1430, 83-1683, 83-1725

In The
Supreme Court of the United States
October Term, 1983

J. BARANELLO & SONS,
Plaintiff-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent.

CONSOLIDATED PRECAST, INC.,
Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent
On the Cross-Petition.

INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,
Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent
On the Cross-Petition.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

COUNTER-STATEMENT OF THE CASE

Procedural History of the Litigation

The dispute between the respondent City of Paterson and the petitioner J. Baranello and Sons, a New York

corporation ("Baranello") and the cross-petitioners, Consolidated Precast, Inc., a Connecticut corporation ("Consolidated") and Independent Electrical Construction Co., Inc. ("Independent") began in early 1977 with the execution of five contracts between Paterson, Consolidated, Independent, Baranello, Davidson Howard and Howard Plumbing and Heating, Inc. and the Conditioning Co., Inc. for the construction of a municipal office building within the City of Paterson, New Jersey. The initial contract amounts totalled $4,841,673.00 and required completion of the structure within a fixed period of time. Arbitration was required for all contract disputes.

From the outset several factors delayed the job, including subsurface conditions and disputes over the proper method and sequence of working. Some contractors demanded arbitration against the City to litigate the cost of these delays. The City, in turn, sought to join in the arbitration all possible responsible parties, including Baranello, the general contractor.

Baranello's response was to file a complaint seeking injunctive relief in the Superior Court of New Jersey, Chancery Division in an effort to enjoin the arbitration against it. The suit was commenced in June, 1978 and judgment was rendered against Baranello shortly thereafter. Baranello filed an appeal from that judgment to the Appellate Division of the New Jersey Superior Court which appeal was decided adversely to Baranello on May 25, 1979. See *J. Baranello & Sons v. City of Paterson*, 168 N.J.Super. 502, 403 A.2d 919 (App. Div. 1979). Baranello subsequently sought certification to the New Jersey Supreme Court; this petition was denied on September 18, 1979. *J. Baranello & Sons v. City of Paterson*, 81 N.J. 340, 407 A.2d 1214 (1979).

As a direct and proximate result of the litigation commenced by Baranello no other party would arbitrate until Baranello was either joined as a party to the arbitration or excused from arbitrating. Baranello's lawsuit imposed a delay of approximately eighteen months in the commencement of the arbitration proceedings.

Twenty-three arbitration hearings were held from the period commencing in September, 1980, until May, 1981. The arbitration award was subsequently rendered and dated October 8, 1981 and signed by two arbitrators. As a result of the award, all five contractors received a total of $3,035,250.00 or approximately $2,500,000.00 more than was payable under the original contracts.

On or about October 28, 1981 complaints and orders to show cause were filed in the New Jersey Superior Court, Law Division, Passaic County by each of the five contractors naming the City as a defendant in each case. The complaints sought confirmation of the arbitrator's award. On November 13, 1981 the New Jersey Superior Court heard arguments in support of the application for confirmation and in opposition thereto and at the conclusion thereof granted summary judgment in favor of the contractors confirming each of the awards. A formal order for judgment was entered on November 23, 1981.

The City filed an appeal from the judgment of the Law Division to the Appellate Division of the Superior Court of New Jersey on November 24, 1981. On August 2, 1983 the Appellate Division of the New Jersey Superior Court reversed the judgments confirming the awards, vacated the awards and remanded the matter "for a new arbitration proceeding". *J. Baranello & Sons v. City of Paterson*, — N.J.Super. —, — A.2d —, (App. Div. 1983).

Subsequently, by order dated November 21, 1983 and filed November 28, 1983 the New Jersey Supreme Court, denied without opinion the petitions for certification of each of the contractors including Baranello and Consolidated. *J. Baranello and Sons v. City of Paterson*, — N.J. —, — A.2d — (1983).

Throughout the course of the litigation in the New Jersey State Courts, the petitioner and cross-petitioners predicated their claims for relief upon the applicability of New Jersey law and did not assert a federal question until the petition for certiorari was filed with this Court.

The matter was remanded to the American Arbitration Association for additional proceedings consistent with the decision of the Appellate Division of the New Jersey Superior Court. The same two arbitrators who rendered the award now under appeal were assigned to arbitrate the remanded proceedings. At the conclusion of the proceedings the arbitrators unanimously made a new award on or about April 16, 1984 which award substantially increased the amount of monies awarded to each of the five contractors.

Thereafter, on or about May 2, 1984 the petitioner, J. Baranello and cross-petitioner, Consolidated Precast filed verified petitions in the United States District Court for the District of New Jersey seeking to confirm the award of the arbitrators. The matters are presently returnable before the District Court on May 29, 1984.

ARGUMENT

Point I.

Certiorari should not be granted in this matter.

Petitioner-Respondent, and Cross-Petitioner now seek, after unfavorable decisions from both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey, to amend the grounds on which they appeal to include the federal question of whether the Arbitration Act, 9 U.S.C. sections 1 through 14 is applicable to this controversy.

To invoke the jurisdiction of this Court, the petitioners now attempt to introduce a federal issue which was never presented on the state level, although they had ample opportunity to do so. It is well settled that the Supreme Court will not decide a question not raised or resolved in the lower courts. *Youkaim v. Miller*, 96 S.Ct. 1399, 425 U.S. 231, 47 L.Ed. 2d 701 (1976). Moreover, on any appeal, the general rule is that an appellate court will not consider an issue not passed upon by the court below. *Singleton v. Wulff*, 96 S.Ct. 2868, 428 U.S. 106, 49 L.Ed. 2d 826 (1976) on remand 538 F.2d 811 (8th Cir. 1976). To allow petitioner ta raise this issue now would subjucate the appellate process, and would, in effect, allow for a *de novo* adjudication of the issues.

Petitioner and Cross-Petitioners place considerable reliance on this Court's decision in *Moses H. Cone Hospital v. Mercury Construction Corp.*, — U.S. —, 74 L.Ed. 2d 765, 103 S.Ct. 927 (1983), even though the holding in *Cone* has no applicability to the matters herein. In *Cone*, there was ongoing and parallel litigation between the state

and federal courts; the federal issue was *not* first entertained on appeal.

Petitioners and Cross-Petitioners attempt to justify their lack of timeliness in addressing the federal issue by alleging that the state courts ability to adjudicate a matter under the Federal Arbitration Act was only decided *after* the state appellate argument when this Court decided *Cone*. However, the applicability of the Federal Arbitration Act in a state court was not at issue in *Cone*; rather, the issue was, whether in light of the parallel litigation, should the federal court abstain until the state court had rendered a decision. There was merely dicta on the question of the applicability of the Federal Arbitration Act to state actions. Consequently, petitioner's and cross-petitioners' reliance upon the timing of the *Cone* decision is at best, dubious.

Moreover, the Federal Arbitration Act has always been applicable to this matter due to diversity in citizenship, making this an action in commerce, as defined by the Act. *Monte v. Southern Delaware County Authority*, 321 F.2d 870 (3rd Cir. 1963). Therefore, if the petitioner and cross-petitioners wished to allege the applicability of the Act, it was ripe for determination in the state court proceedings, and it was incumbent upon them to raise it at that time. Petitioner and cross-petitioners not only had the choice of a federal or state forum but also had the choice of addressing both state and federal questions in the chosen forum.

Furthermore, petitioner and cross-petitioners make no allegation as to any difference an adjudication under the Federal Act would have from the adjudication under the

state act. In actuality, Petitioner Baranello contends in its Petition for *Certiorari*, at page 3, that both statutes are similar in the applicable provisions of contract interpretation and evidence.

It therefore appears that to grant this petition for *certiorari* would result in duplicitous litigation which would ultimately not change in any way the decisions of the lower courts.

Point II.

The arbitration award should not be allowed to stand.

The opinion of the Appellate Division of the New Jersey Superior Court vacated the arbitrators' decision which improperly awarded petitioners approximately $2,500,000.00 in additional public monies. In doing so, that court merely applied the well settled principle that courts will not permit arbitrators to ignore contract provisions or rewrite agreements to suit the arbitrators subjective ideas of justice or fair dealing.

Numerous cases have enunciated the appropriate standard of judicial review of arbitration awards. Ordinarily awards will be upheld in the absence of good reason to reject them. *Order of Ry. Conductors and Brakemen v. Clinchfield R. Co.*, 407 F.2d 985, (5th Cir. 1969) *certiorari* denied 90 S.C.t 104, 396 U.S. 841, 24 L.Ed.2d 92 (1969). Judicial review is narrow, generally confined to errors which appear on the face of the award, and every intendment is indulged in favor of the award.

However, while lower courts are to give considerable deference to decisions of arbitrators, such deference is

not conclusive. *International Union of Operating Engineers, Local #450 v. Mid-Valley, Inc.*, 347 F.Supp. 1104 (D.Tex. 1972). If an arbitrator meant to decide an issue according to law but was mistaken in some palpable and material point, the award should be set aside. Arbitrator's findings of fact are conclusive unless they are arbitrary or capricious and not supported by evidence. *International Auto Sales and Service, Inc., v. General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union #270*, 311 F.Supp. 313 (D.LA, 1970).

The Appellate Division noted that while arbitrators have broad powers, "especially in the private sector", they may not disregard the terms and conditions of the contract. (A-9).* Indeed, several New Jersey labor relations cases emphasize the care arbitrators must take when dealing with public employees and employers, that their awards be guided by "pertinent statutory criteria as well as the public interest and welfare," *Kearny P.B.A. Local #21 v. Kearny*, 81 N.J. 208, 217 405 A.2d 393, 397 (1979). See also the distinctions between public and private employee arbitrations, *State v. State Troopers Fraternal Association*, 91 N.J. 464, 469, 453 A.2d 176, 179 (1982).

This is not to say a public entity ought to automatically have its way in arbitrations. However, it offers the basis for stricter scrutiny of arbitrator's awards to be paid out of the public treasury.

Petitioner and Cross-Petitioners argue that if the Appellate Division decision implies strict standards of re-

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*This notation refers to the appendix of Petitioner Baranello.

view, there may be delays in the enforcement of arbitration awards. Here the work began in 1977 and the legal wrangling continues into 1984, seven years later. A substantial portion of the delay in adjudication is directly attributable to Baranello.

The argument overlooks that a substantial delay resulted from the injunction against arbitration in connection with the Baranello suit with Paterson. It seems unfair for the Petitioner to complain about the delay which Baranello itself imposed on the process. "Judicial interference" was not something Baranello seemed to fear.

The entire process has been complicated, undoubtedly by the number of parties, complaints, counterclaims and cross-claims over a range of issues including proper workmanship, responsibilty for control, role of the architect, etc.; and the fact that six attorneys, two (and sometimes three) arbitrators and witnesses all had to coordinate schedules. Given these complexities none of the delay appears unwarranted or surprising.

The effectiveness of arbitration is threatened as much by the possibility of an irrational result as it is by the risk of delay. Unless the Appellate Division opinion is allowed to stand, any competent lawyer would have to advise his client that arbitration is swift but unsure. Attorneys would soon perceive that despite its advantages, arbitration carries a great risk of arbitrariness. When their decisions reflect disregard for the parties written intentions, arbitrators' awards ought to be vacated in order to protect the integrity of the arbitration process.

Suffice it to say that:

To merit judicial enforcement, an arbitration award must be grounded in the terms of the applicable con-

tract. If the arbitrators position is not rationally inferable from the contract, he has exceeded his jurisdiction. . . .

In re Arbitration Between Mary and William Harris, 140 N.J.Super. 10, 15, 354 A.2d 704, 707 (App. Div. 1976).

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition and cross-petitions for a writ of *certiorari* should be denied.

Date: May 21, 1984.

Respectfully submitted,

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No. 83-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

J. BARANELLO & SONS,

Plaintiff-Petitioner,

— against —

CITY OF PATERSON,

Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY BRIEF ON PETITION FOR CERTIORARI

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ARGUMENT

Points Raised by Respondent

This Reply Brief is respectfully submitted on behalf of petitioner J. Baranello & Sons ("Baranello") in response to the Brief in Opposition of respondent City of Paterson ("the City"). The City argues at Point I that Baranello cannot enforce the arbitration award because the federal statute was not raised at the state court level, and at Point II that the arbitration award should not be allowed to stand because the arbitrators may have awarded damages based upon a misinterpretation of the contract. The City fails to cite a single decision under the federal Arbitration Act in support of its position that the award should be vacated, and purports to rely instead upon "the well settled principle that courts will not permit arbitrators to ignore contract provisions", and upon precedents from the New Jersey courts, which have frequently overturned arbitration awards in recent years and appear to have adopted the view that the federal Arbitration Act need not be applied by state courts.

This Reply Brief will demonstrate (a) that the instant case presents an important question for decision by this Court, (b) that the federal question was clearly raised below, (c) that the supremacy clause requires state courts to recognize the limitations imposed by the Arbitration Act upon the power of courts to review awards, and (d) that a uniform standard of review, applicable in all states and all federal circuits, should be set forth by this Court at this time.

The Importance of This Petition

On the instant Petition for Certiorari, this Court must decide only whether to review the New Jersey courts' treatment of the arbitration award rendered in favor of Baranello against the City. It is submitted, however, that the determination of that question by this Court, which has never passed upon the standard of judicial review of the merits of an award under the Arbitration Act, will also determine whether the New Jersey courts' decisions will be permitted to operate as a signal to industry

throughout this country that commercial arbitration will henceforth be a prolonged, formal, expensive and inconclusive process which should be avoided at all cost.

Baranello's contract with the City was executed on a standard printed form promulgated by the American Institute of Architects ("A.I.A."), endorsed by the Associated General Contractors of America and used by thousands of owners and contractors nationwide. The arbitration clause printed in the contract provided for resolution of disputes pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association, an organization at the forefront of dispute-resolution in this country whose credentials are universally recognized. The arbitration clause was identical to the one construed by this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. ____, 103 S.Ct. 927, 931, 74 L.Ed.2d 765, 773 (1983), in which delay claims similar to those of Baranello were declared to be arbitrable. The arbitration proceedings were administered by experienced arbitrators whose integrity and expertise in the construction industry are unchallenged.

It should be remembered that at the outset of the arbitration proceedings here at issue, the Appellate Division ruled that the arbitration clause was very broad and covered *"all* claims, disputes and other matters arising out of *or related to* the contract". *J. Baranello & Sons v. City of Paterson*, 168 N.J. Super. 502, 507, 403 A.2d. 919, 921 (App. Div. 1979), *certif. denied*, 81 N.J. 340, 407 A.2d 1214 (1979) (emphasis in original). The significance of such prior judicial finding is underscored by the following quotation from *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 703 (2d Cir. 1978):

> We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards "[w]here the arbitrators exceeded their powers," 9 U.S.C. § 10(d), especially where that language has been invoked in the context of arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.

After the arbitration award was rendered by the arbitrators and confirmed by the trial court, however, the Appellate Division in the decision now under review by this Court vacated the entire arbitration award merely because the court "cannot tell" whether the arbitrators awarded damages on certain portions of the claim which the court apparently would have denied under its own interpretation of the contract.

It is respectfully submitted that "due process" in the instant case requires reinstatement of the judgment of the trial court confirming the award. Perhaps even more important on the instant Petition for Certiorari, it is further submitted that the understandings and expectations of thousands of contractors and owners nationwide regarding the nature of arbitration should not be permitted to remain uncertain by allowing the New Jersey decision to stand unaddressed by this Court.

The Federal Statute Was Raised Below

The City's contention in Point I of its Brief that Baranello is now seeking "to amend the grounds on which they appeal to include the federal question of whether the Arbitration Act *** is applicable to this controversy", and that the federal issue "was never presented on the state level", is simply not true. Baranello obtained confirmation of the arbitration award at the trial level by a judgment which was later reversed by the Appellate Division; accordingly, Baranello's first appeal was to the Supreme Court of New Jersey. Baranello's Petition for Certification to the Supreme Court of New Jersey cited as the first of "the errors complained of" that, "The Appellate Division ignored applicable state and federal standards of review of arbitration awards ***," and further stated as follows (at pp. 6-7):

> In its review of the arbitrability of the instant dispute, the Appellate Division should also have looked to the federal law of arbitration, applicable to the City's construction contract with Baranello (a New York entity) as "a transaction involving commerce" within the meaning of section 2 of the federal Arbitration Act (9 U.S.C. §§1-14). *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ____ U.S.

> ____, 74 L.Ed.2d 765, 785-787 (1983); *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 384 (2d Cir. 1961); *Sears Roebuck & Co. v. Glenwal Co.*, 325 F.Supp. 86 (S.D.N.Y. 1970), *affirmed on opinion below*, 442 F.2d 1350 (2d Cir. 1971); *Burke Public Schools Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981). It has consistently been held under the federal Arbitration Act that even a "clearly erroneous" interpretation of a contract is insufficient ground to vacate an award unless the result is "completely irrational." *National Railroad Passenger Corp. v. Chesapeake and Ohio Railway Co.*, 551 F.2d 136 (7th Cir. 1977); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974). ***

The federal Arbitration Act does not require that proceedings to confirm an award be commenced in federal court rather than in state court, and it should not be held that Baranello has waived its substantive rights under the federal statute merely because it cited the state statute as the procedural basis for its application in the state court for an order to show cause to obtain confirmation of the arbitration award on an expedited basis. *See Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949); *Reed & Martin, Inc., v. Westinghouse Electric Corp.*, 439 F.2d 1268, 1277 (2d Cir. 1971); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 412-413 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960). In any event, the applicability of the federal statute was clearly raised while the case was still in the state court system, as soon as it became apparent that Baranello's federal substantive rights were not being protected. That the federal issue was squarely presented there is further demonstrated by the fact that Point IV of the City's Brief in the Supreme Court of New Jersey was entitled, "Federal Law Has No Applicability to this Case." The federal question is properly before this Court. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85, n. 9 (1980); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

New Jersey Has Failed to Follow the Federal Standard of Review

Section 9 of the Arbitration Act, 9 U.S.C. §9, explicitly requires confirmation by a reviewing court "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Most courts have concluded that the strong federal policy favoring arbitration requires that Sections 10 and 11, which set forth the specific reasons for which a court may refuse to confirm an award, be applied only in exceptional circumstances.

This Court has stated, in *dicta*, that under the Arbitration Act, courts may not review an arbitrator's interpretation of either the facts or the law, even if the arbitrator misconstrued the contract language. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); and *Wilko v. Swan*, 346 U.S. 427, 436 (1953).[1] Accordingly, as stated in the above quotation from Baranello's petition to the Supreme Court of New Jersey, the federal circuit courts have consistently held that the Arbitration Act restricts courts from vacating arbitration awards challenged on their merits unless the result is "completely irrational". In accord with the cases there cited are *John T. Brady & Co. v. Form-Eze Systems, Inc.*, 623 F.2d 261 (2d Cir. 1980), *cert. denied*, 449 U.S. 1062 (1980); *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3rd Cir. 1972); *Raytheon Co. v. Rheem Manufacturing Co.*, 322 F.2d 173, 182-183 (9th Cir. 1963); *Kanmak Mills v. Society Brand Hat Co.*, 236 F.2d 240 (8th Cir. 1956).

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[1] This Court's suggestion in *Wilko v. Swan*, *supra*, that an award might be overturned where "manifest disregard" for the law were made clearly to appear, 346 U.S. at 436-437, has repeatedly given pause to courts reviewing commercial arbitration awards, and although not cited by either the City or the Appellate Division, it may be worthy of clarification by this Court. For example, in *San Martine Compania de Navigacion, S.A. v. Saguenay Terminals, Ltd.*, 293 F.2d 796 (9th Cir. 1961), the Ninth Circuit noted that "the Supreme Court's use of the words 'manifest disregard', has caused us trouble here", but concluded that manifest disregard of the law "must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *See also Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, 628 F.2d 81 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 983 (1980).

In the instant case, the New Jersey state courts ignored the mandate of the federal Arbitration Act, the holding of this Court in *Moses H. Cone* as to the scope of the arbitration clause in the A.I.A. contract, and the federal circuit court precedents regarding the standard of judicial review, and instead added to a long line of recent New Jersey cases which have refused to confirm arbitration awards, including *State v. State Troopers Fraternal Assn.*, 91 N.J. 464, 453 A.2d 176 (1982); *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (1981); *In re Arbitration Between Grover and Universal Underwriters Ins. Co.*, 80 N.J. 221, 403 A.2d 448 (1979); *In re Arbitration Between Harris v. Security Ins. Group*, 140 N.J.Super. 10, 354 A.2d 704 (App. Div. 1976); *Belardinelli v. Werner Continental, Inc.*, 128 N.J.Super. 1, 318 A.2d 777 (App.Div. 1974). The dissents in these New Jersey cases demonstrate the extent of the apparent rift between the policy of New Jersey and the federal policy embodied in the Arbitration Act. For example, Justice Pashman's dissent in *Grover* began as follows:

> The majority today rules that a court may substitute its conclusion for that of an arbitrator simply because it disagrees with his decision. In so holding, it not only departs radically from existing caselaw dealing with the nature of judicial review of arbitrators' awards but, more importantly, strips commercial arbitration of its basic value.

80 N.J. at 233, 403 A.2d at 454. Similarly, Justice Clifford's dissent in *Barcon* began with the following statement:

> Presented with the opportunity to fuse the applicable law with the real world of long-standing, successful commercial practice, the Court has chosen instead to "throw a monkey wrench into the gears" of tripartite commercial arbitration.

86 N.J. at 200, 430 A.2d at 224.

At the time of the decision below, a number of states in addition to New Jersey were questioning the applicability of the federal statute in state court proceedings, *e.g.*, *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), *cert. denied*, 342 U.S. 812 (1951); *Standard Co. of New Orleans v. Elliott Const. Co.*, 363 So.2d 671 (La. 1978); *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del.Super. 1973). However, since the date of the decision below, this Court explicitly confirmed that the federal Arbitration Act is applicable in state court proceedings, in *Southland Corp. v. Keating*, 465 U.S. ____, 104 S.Ct. 852, 52 U.S.L.W. 4131 (1984), and summarily reversed and remanded two other arbitration cases to the Supreme Court of Georgia and the Supreme Court of Alabama, respectively, in *Local 732 v. Metro Atlanta Rapid Transit*, ____ U.S. ____, 104 S.Ct. 1263, 52 U.S.L.W. 3610 (1984), and *York International v. Alabama Oxygen Co., Inc.*, ____ U.S. ____, 104 S.Ct. 1260, 52 U.S.L.W. 3212 (1984).

We submit that where interstate commerce is involved, the State of New Jersey should not be permitted to maintain its own policy disfavoring commercial arbitration. Accordingly, this Court should at least order a remand to the Supreme Court of New Jersey similar to those in *Metro Atlanta* and *Alabama Oxygen*. In addition, however, the history of this case and of the decisions of the New Jersey courts on the subject of arbitration suggest that a clear statement of the applicable standard of review should be issued by this Court.

The City Has Not Restated the Question Presented for Review

The City has not challenged Baranello's statement of the question presented for review by this Court, namely, whether a commercial arbitration award must be vacated unless the panel has disclosed the basis of its award in sufficient detail to establish that the panel followed all technical rules of contract interpretation and all technical rules of evidence. Instead, the City argues (Point II of its Brief) that since public monies are at stake, the decision below was correct in giving the award "stricter scrutiny" and in vacating the award because the reviewing court simply

"cannot tell" whether the award includes monies which the court, on the basis of the abbreviated record filed in the confirmation proceedings, would not have awarded. Thus, the City and the decision below would shift the presumption favoring arbitration awards to a presumption disfavoring them, thereby requiring the proponent of the award to produce evidence sufficient to establish that no prescribed item of damage could possibly have been included in the award.

The arbitrators' ruling to which the City has objected, which amounted to a refusal to declare which party seemed to be prevailing on the evidence submitted up to that point in the hearings,[3] would in any event appear to fall within the category of procedural or evidentiary rulings which courts simply do not have the power to disturb under the Arbitration Act. In *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448 (2d Cir. 1944), Judge Learned Hand stated as follows:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with it informalities; they may not hedge it about with those procedural

[3] Citing sections 8.3.2 and 2.2.11 of the General Conditions of the contract, the City had argued on a motion raised during one of the hearings, and later to the trial court and on appeal to the Appellate Division, that certain claims for delay were barred by a failure to have given written notice within 20 days of the discovery of the conditions. The Appellate Division vacated the award based upon its own interpretation of sections 12.1.6, 12.1.7 and 12.2.1 (reprinted in the Appendix to Baranello's Petition, pp. A-34, *et seq.*), three sections which the City had never raised and which make no reference to the arbitration process. Accordingly, Baranello was never given an opportunity to demonstrate to the court that the record before the arbitrators established that it complied with the notice requirements on which the reversal of the award was based. As observed in the City's Brief, the arbitration panel has reconsidered the evidence presented during the original hearings as directed by the decision below and awarded the contractors sums larger than those previously awarded, apparently after adding interest and attorneys' fees to the amounts of the old award. The City is challenging the new award, and Baranello is proceeding with a full reservation of rights as to the old award, and in the alternative as to the new award.

> limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

144 F.2d at 451.

Perhaps the most serious danger of the decision below is that it runs counter to the prevailing view of the arbitration process that the arbitrators should be liberal in receiving evidence, to permit a full and fair hearing consistent with notions of due process. The prospect of lay-person arbitrators, no matter how well-intentioned, attempting to make restrictive rulings as to the admissibility of relevant evidence based upon their own understanding of the intricacies of the applicable law, is one which should not be fostered.

Even before the enactment of the first United States Arbitration Act in 1925, this Court found that equity required courts to enforce arbitration awards, holding as follows in *Burchell v. Marsh*, 58 U.S. 344, 349-350 (1855):

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.***

Since the award in this case was rendered for a lump sum, there is no way to tell whether any damages were in fact awarded for the delays which the court said had been waived, and therefore the award should have been sustained. In *Burchell v. Marsh*, *supra*, this Court upheld a lump-sum award over an objection similar to that made in the instant case, stating as follows:

> It has been argued, that because the arbitrators received evidence of the slanderous language used by Cross, that, therefore, they included in their award damages for his slanders, for which his principals would be liable; and that, therefore, they had taken into consideration matters not contained in the submission. But the answer to this allegation is, that the record shows no admission or proof that the arbitrators allowed any damages for the slanders of Cross. *** Every presumption is in favor of the validity of the award. If it had stated an account, by which it appeared that the arbitrators had made a specific allowance of damages for the slanders of Cross, it would have been annulled to that extent at least, as beyond the submission. But it cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject matter of it.

58 U.S. at 350-351.

In sum, it is respectfully submitted that a uniform standard of review of commercial arbitration awards, applicable in all states and all federal circuits, should be enforced by this Court in order to give effect to the strong federal policy favoring arbitration addressed by this Court in *Moses H. Cone* and *Southland*. The forum selection principles set out in those decisions will be of little avail to litigants unless arbitration awards, once rendered, can be enforced in the courts.

CONCLUSION

Baranello's Petition for Certiorari should be granted.

Dated: Washington, D.C.
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